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Nos. 82-1248, 82-1278

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1982

Ellen Schall, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

Robert Abrams, as Attorney-General of the State of New York,

Intervenor-Appellant,

vs.

Gregory Martin, Luis Rosario, Kenneth Morgan, and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL JUVENILE LAW CENTER ON BEHALF OF APPELLEES

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Statement of Interest

Amicus curiae, the National Juvenile Law Center (NJLC), was established in 1970 to provide specialized legal assistance in the area of juvenile law to state and local legal services, legal aid, public defender and citizens advocacy programs throughout the fifty states and the Commonwealth of Puerto Rico. The NJLC has in the past appeared before this Court as amicus curiae on behalf of children and their families.

The NJLC has concentrated on representing the interests of juveniles who are either facing the prospect of or who are actually being subjected to secure confine-

ment in state or local jails, detention centers or treatment facilities. The constitutionality of the practice of "preventive detention" raised in the case now before this Court is of particular concern to Amicus in that the NJLC (along with the Juvenile Law Center of Philadelphia) is presently representing a similar class of juveniles raising similar challenges in the state of Pennsylvania. Amicus thus has a vital interest in the resolution of this case. Written consent of the parties for the filing of this brief has been filed with the Clerk of the Court.

Summary of Argument

The statutory provision challenged by the Appellees in this case, Section 320.5(3)(b) of the New York Family Court Act, involves what has come to be known as "preventive detention". Under this statutory scheme, Appellants are empowered to place a child in secure confinement prior to an adjudication of guilt whenever Appellants believe that the accused child is likely to engage in further delinquent or criminal behavior while the adjudication hearing on the existing offense is pending. In attempting to defend such a practice, the Appellants and

Amici for the Appellants have raised a number of novel and disturbing arguments, including the rather ominous prediction that the beneficial aspects of a separate juvenile justice system will be destroyed through this Court's affirmance of the rulings of the district court of New York and the Court of Appeals for the Second Circuit. These same arguments were made to this Court in the mid-sixties regarding the provision of such basic constitutional rights as the child's right to counsel and the requirement that guilt be proven beyond a reasonable doubt. The juvenile justice system did not, however, perish with the rendering of this Court's decisions

in Kent v. United States, 383 U.S. 541 (1966), In re Gault, 387 U.S. 1 (1967), or In re Winship, 397 U.S. 358 (1970). Indeed, Amicus for the Appellees asserts that the operation of each state's juvenile justice system was improved through such decisions, benefiting both the child and society. This Court's affirmance of the opinions and orders of the courts below will continue that trend.

Amicus for the Appellees contends that the preventive detention which is authorized by the challenged statutory provision imposes punishment upon the Appellees prior to any adjudication of guilt in violation of the Appellees' constitutional rights.

By the statute's operation, Appellees are deprived of their freedom without a prompt determination of probable cause being made by a neutral and detached judicial officer. Gerstein v. Pugh, 420 U.S. 103 (1975); R.W.T. v. Dalton, 712 F.2d 1225 (8th Cir. 1983); Moss v. Weaver, 525 F.2d 1258 (5th Cir. 1976). Appellees are also deprived of their freedom based upon a prediction that they will commit further crimes unless detained, a prediction that simply cannot be made with any degree of reliability. Furthermore, no matter what degree of predictability may or may not exist in this area, secure confinement cannot be justified on the basis of

behavior and events which have not yet taken place. Such a practice is antithetical to our nation's basic constitutional premises that anyone who stands accused of a crime is presumed innocent until proven guilty in a court of law, that no punishment may be imposed by the state until the accused is found guilty, and that punishment may only be meted out for what the convicted person has done, not for what he may or may not do in the future.

ARGUMENT

I. The Practice of Preventive Detention Imposes Punishment Prior to Any Adjudication of Guilt, Thereby Violating the Appellees' Constitutional Rights.

It is a fundamental principle of this nation's system of laws that a citizen may not be punished for a crime which he has been accused of committing prior to a finding of guilt. Bell v. Wolfish, 441 U.S. 520, 535 (1979). This is particularly true for juveniles such as the Appellees, in that the New York Family Court Act, like the juvenile codes of every state, mandates rehabilitative care and treatment for the child and not the punishment which characterizes the

adult criminal justice system. Amicus for the Appellees do not here argue the issue of whether under such a separate statutory scheme juveniles such as Appellees may ever be subjected to punishment by the state. Amicus for the Appellees respectfully contends, however, that punishment may not be inflicted upon the Appellees prior to an adjudication of guilt, especially under the challenged statutory provision which allows for the imposition of this punishment for crimes which it is feared the Appellee will commit in the future.

> Our criminal system has made a basic choice: crimes are to be deterred by the threat of subsequent punishment, not by prior confinement. States should not be permitted to

> undermine this judgment by substituting pretrial detention...for the existing criminal system which favors freedom prior to conviction.

Sistrunk v. Lyons, 646 F.2d 64, 70 (3d Cir. 1981).

Pretrial detention, be it deemed "preventive" or otherwise, by definition involves a deprivation of personal liberty. Because the liberty interest of the Appellees at stake here is one of the most fundamental of all interests protected by the due process clause of the fifth and fourteenth amendments, the challenged practice of preventive detention is subject to strict judicial scrutiny. United States v. Edwards, 430 A.2d 1321 (D.C. 1981) (en banc), cert. denied, 455 U.S. 1022 (1982);

People ex rel. Wayburn v. Schupf, 39 N.Y.2d 682, 385 N.Y.S.2d 518, 350 N.E.2d 906 (1976). Such a practice will be upheld only in the face of a compelling state interest, Roe v. Wade, 410 U.S. 113 (1973), which cannot be protected or promoted by any less intrusive means. NAACP v. Alabama, 377 U.S. 288 (1964). Finally, the statute must be "necessary" for, and not merely "rationally related" to the effectuation of that interest. McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

The application of such a standard of review by this Court flows from the nature of the Appellees' challenge. Unlike the

pretrial detainees in Bell v. Wolfish, who challenged the conditions of their confinement, Appellees here challenge the very fact of their confinement. In Bell v. Wolfish there was no question as to whether the adult prisoners were properly detained in the first place, and therefore the rational relationship standard was deemed to be acceptable. 441 U.S. at 534, n. 15. By challenging the very fact of their confinement, Appellees are entitled to an analysis of preventive detention under the "strict scrutiny-compelling state interest" test.

The Appellants, of course, also have a number of interests which the practice of preventive detention is said to protect and promote. Pretrial detention obviously insures that the accused will present himself for trial. The state also has a moral and economic interest, however, in insuring that those who need not be detained for the above reason are not in fact detained. In addition to the traditional interests served by pretrial detention, Appellants and Amici for the Appellants argue that the practice of preventive detention challenged here serves to protect the public and operates for the benefit of the Appellees.

Punishment is not mentioned as an intended purpose of the statutory provision.

It cannot be argued that the protection of the public pending a juvenile's adjudicatory hearing and the provision of rehabilitative services to the child are not laudable state interests. Preventive detention, however, as it will be shown, is not a constitutionally permissable means for the effectuation of those interests.

Amicus for the Appellees respectfully suggests that Appellants' defense of the challenged statute is simply a matter of semantics and labelling which this Court has historically

held to be nondispositive on the issue of the challenged procedure's actual effect. Gault; Winship; Breed v. Jones, 421 U.S. 519, 530 (1975). The plain language of the statute indicates a clear legislative intent to prevent future delinquency or criminality by locking up the Appellees. The fact that the statute does not include the words "punishment" or "retribution" does not detract from its punitive intent and effect.

> It would be archaic to limit the definition of "punishment" to "retribution." Punishment serves several purposes: retributive, rehabilitative, deterrent - and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.

United States v. Brown, 381 U.S. 437, 458 (1965) (emphasis added).

If the plain language of the challenged statute is not convincing regarding the existence of a punitive statutory purpose and intent, however, the analysis shifts to a consideration of the factors set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). This test was recently utilized in this Court's scrutiny of adult pretrial detention in Bell v. Wolfish. In determining whether Appellees are being punished through the practice of preventive detention, this Court should look to

> [w]hether the sanction involves an affirmative disability or restraint,

> whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry ....

Mendoza-Martinez, 372 U.S. at 168-169 (footnotes omitted). See also, Ingraham v. Wright, 430 U.S. 651 (1977); United States v. General Motors, 403 F. Supp. 1151, 1158 (D. Conn. 1975).

In assessing these factors it is clear that preventive detention imposes an affirmative restraint; the Appellees are deprived of their liberty. The imposition of a

period of secure confinement is in like manner the epitome of what society has historically considered to be punishment. Even more clearly, one of the stated goals of preventive detention is to deter and prevent future criminality, a traditional aim of punishment.

In defense of the statute, an alternative purpose for preventive detention has indeed been forwarded by the Appellants. That purpose is the protection of society and the Appellee. As will be argued in more detail below, however, this alternative purpose is not rationally connected to the operation of the challenged statute. Finally, the practice of locking up Appellees based upon the statute's

untenable premises is clearly excessive; alternative programs such as in-home detention and close pretrial supervision and counselling can be utilized for the protection of the child and society.

Pretrial detention is an onerous punitive experience, especially when the detainee is a juvenile. The accused will spend his days securely confined in some form of institution. He is thereby removed from his family, friends and a normal living environment, all of which are critically important for healthy adolescent development. No matter how brief or prolonged, pretrial detention will have an adverse impact on the

juvenile's schooling or work opportunities. Compounding this problem is the fact that little in the way of constructive services or programming is offered to the youth while he is detained. The detained juvenile is also subjected to the social stigma which attaches to those held in secure confinement by the state. While confined, his ability to assist his attorney in the preparation of his defense is damaged. Finally, the youth's own self-image is adversely affected by the experience of being locked up and a delinquent self-concept may be fostered or reinforced. In these respects, the effects of pretrial detention of the Appellees are hardly different than those

suffered by detained adults accused of criminal behavior. Indeed, in light of the fact that Appellees are children, the punitive effects of pretrial detention are magnified.

Congressional recognition of the harmful and nonrehabilitative effects which secure pretrial detention has on a child can be found in its enactment of the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA), 42 U.S.C. §5601 et seq. Under the JJDPA, community-based treatment provided in nonsecure settings is to replace the historical practice of secure detention, a practice which is counterproductive to the troubled child's rehabilitative

needs. 42 U.S.C.§5633(10)(H)(iv).

Application of the Mendoza-Martinez analysis to the challenged practice of preventive detention indicates that the actual effect of the statute is punitive, despite the illusory alternative purposes which are asserted in its defense by the Appellants. Punishment thusly imposed upon Appellees prior to a finding of guilt is violative of due process. Bell v. Wolfish, 441 U.S. at 535.

In support of their contentions that future delinquency or criminality can be predicted and that such prediction may form a constitutionally permissible basis for detention, Appellants and their

Amici have relied upon this Court's decisions in Jurek v. Texas, 428 U.S. 262 (1976), and Barefoot v. Estelle, 51 U.S.L.W. 5189 (U.S. July 6, 1983), as well as the decisions in United States v. Edwards and People ex rel. Wayburn v. Schupf. Jurek and Barefoot, however, dealt with adult criminal court sentencing procedures and not with pretrial detention practices. In Barefoot, this Court ruled that it was constitutionally permissible during the course of a jury's deliberations regarding the imposition of the death penalty for the jury to consider evidence of the future dangerousness which a convicted murderer might pose to the community. In other words, the

future dangerousness of a convicted murderer was deemed to be "an acceptable criterion for imposing the death penalty." Barefoot v. Estelle, 51 U.S.L.W. at 5194.

Amicus for the Appellees respectfully contends that the rulings of this Court in Jurek and Barefoot are not controlling regarding the issues now before this Court. Neither decision ruled on the issue of whether predictions of dangerousness can be accurately made. Also, both decisions involved convicted adults who were facing sentencing. Furthermore, the prediction being made in those cases was that of future dangerousness, as evidenced at least in part by the conviction for

a dangerous crime which the jury had just handed down. In the case at bar, pretrial detention may be imposed upon the prediction of any sort of future criminality or delinquency, regardless of its dangerous or nondangerous nature. The Barefoot inquiry is therefore more narrowly focused than that allowed through the challenged statute.

Also, the sanction which results from a Jurek or Barefoot prediction is imposed upon an adult who has already been tried and found guilty of committing a dangerous offense. This is perhaps the most critical distinction between the case at bar and Jurek and Barefoot. In contrast, the

prediction required by the challenged statutory provision now before this Court is made prior to any trial of the accused juvenile in order to allegedly protect the community from future acts of delinquency, thereby punishing the child for crimes he has not committed.

Finally, the prediction of future dangerousness which was made in Barefoot was but an "acceptable criterion" during the sentencing process. Here, the prediction of future delinquency is itself the very reason for imposing the sanction of secure confinement. What is a constitutionally acceptable consideration with regard to a convicted adult

murderer should not be likewise acceptable for a juvenile who merely stands accused of some delinquent act.

More on point in support of Appellants' position are the cases of United States v. Edwards, and People ex rel. Wayburn v. Schupf, though again Amicus for the Appellees contends that they are not controlling. Edwards involved a challenge to the District of Columbia's adult preventive detention statute. The Edwards court upheld the constitutionality of the statute by finding that preventive detention was regulatory rather than punitive because the "established dangerousness" of the accused warranted the curtailment

of "reasonably predictable conduct", and did not "punish for prior acts." 430 A.2d at 1332. Amicus for the Appellees respectfully contends that the Edwards court erred by assuming as fact the very point at issue. A "reasonable" prediction of future criminality implies a degree of accuracy in the prediction which simply does not exist. See, e.g., American Psychiatric Association, Task Force Report on the Clinical Aspects of Violent Individuals 28-30 (1974); Rubin, Prediction of Dangerousness In Mentally Ill Criminals, 27 Arch. General Psychiatry 397 (1972); Proposed District of Columbia Omnibus Crime Bill: Hearings On S.2601 Before

the Senate Committee on the District of Columbia, 91st Cong., 1st Sess. 31 (1969) and 2d Sess. 2153 (1970) (comments of Judges Wald and Green); Monahan, The Prediction of Violent Behavior in Juveniles 10-11 (paper presented at National Symposium on the Serious Juvenile Offender in Minneapolis, Sept. 19-20, 1977, quoted in Feld, Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions, 62 Minn. L. Rev. 515, 541-542 (1978); Schlessinger, The Prediction of Dangerousness in Juveniles: A Replication, 24 Crime & Delinquency 40, 47 (1978); Cocozza & Steadman, The Failure of Psychiatric Predictions of

Dangerousness: Clear and Convincing Evidence, 29 Rutgers L. Rev. 1084, 1094-1101 (1976); Dix, Clinical Evaluation of the Dangerousness of "Normal" Criminal Defendants, 66 Va. L. Rev. 523, 542-544 (1980); Wenk, Robinson & Smith, Can Violence Be Predicted, 18 Crime & Delinquency 393, 401 (1972); Preventive Detention: An Empirical Analysis, 6 Harv. Civ. Rights - Civ. Lib. Rev. 289 (1971); Cohen, Groth & Siegal, The Clinical Prediction of Dangerousness, 24 Crime & Delinquency 28 (1976); Kozol, Boucher & Garofolo, The Diagnosis and Treatment of Dangerousness, 18 Crime & Delinquency 371 (1972); Tribe, An Ounce of Detention:

Preventive Justice In the World of John Mitchell, 56 Va. L. Rev. 371 (1970); Diamond, The Psychiatric Prediction of Dangerousness, 123 U. Pa. L. Rev. 439 (1974); Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins In the Courtroom, 62 Cal. L. Rev. 693 (1974); Steadman & Cocozza, Psychiatry, Dangerousness and the Repetitively Violent Offender, 69 J. Crim. L. & Criminology 226, 229-231 (1978).

Predictions can, of course, still be attempted and may even be properly considered in cases such as that presented by Barefoot. They cannot, however, form the basis of a regulatory purpose such as the prevention of crime, which,

according to the Edwards court, does not amount to punishment when it takes the form of secure pretrial confinement. Contra, Campbell v. McGruder, 580 F.2d 521, 530 (D.C. Cir. 1978) ("pretrial detention itself is indistinguishable from punishment...").

Another departure from the case at bar lies in the fact that the statutory scheme challenged in Edwards contained limitations upon who could be preventively detained. In the District of Columbia, preventive detention could only be imposed upon a formal determination by the judicial officer ordering detention that there exists probable cause to believe the accused

committed one of the statutorily enumerated "dangerous crimes" or "crimes of violence". In that Amicus for Appellees believes that any period of secure confinement prior to trial which is based upon a prediction of future delinquency is unconstitutional per se, the narrowing effects which the District of Columbia statute may have will not be addressed. That statute's narrowing provisions do, however, provide some cure for the vagueness and unbridled discretion which the Appellees and Amici for the Appellees contend is unconstitutional in the New York statute.

The court in People ex rel. Wayburn v. Schupf, considered the

same provisions of the then existing New York juvenile code at issue here, and concluded that they were not violative of a juvenile's equal protection or due process rights. The Wayburn court did not engage in an analysis of whether preventive detention amounted to punishment however. Rather, the court focused on the distinctions between the adult criminal justice system and the juvenile court process. Preventive detention of juveniles was held to be constitutional because, in the eyes of the Wayburn court, "there is a greater likelihood that a juvenile charged with delinquency, if released, will commit another criminal act than that an adult

charged with crime will do". 350 N.E.2d at 909. The Wayburn court believed that since juveniles were less mature and less likely to comprehend the seriousness of their potential pretrial criminality, the state was more than justified in locking them up in order to protect them from their own "folly". Id. The Wayburn court, however, commits the same error that the Edwards court did regarding the predictability of future criminality, stating that "[t]he predicate which triggers the discretionary authority [to detain] under the statute is a finding that there is a serious risk that the juvenile charged with delinquency may commit another criminal act -an objective

fact." 350 N.E.2d at 908 (emphasis added). A determination that a "serious risk" exists is not an objective fact; it is a guess, and a guess which no one has argued can be made with any degree of reliability. See authorities cited at page 28, supra. Judge Tuchsberg, concurring in the result in Wayburn would have held the statute unconstitutional on this basis:

> Choices among juveniles as to who is a risk and who is not are thus essentially random and inexplicable in terms of any articulated and validated behavioral criteria. Such a procedure is inherently arbitrary and violative of due process.
>
> * * * *
>
> Of course, I share the majority's deep concern about the escalating incidence of violent crime, regrettably

> committed by children as well as adults. But suspension of the right not to be punished before one is found guilty is not a permissible solution, if it is any solution at all.

350 N.E.2d at 911-912.

In the very literal sense, it is of course possible to make a pronouncement predicting future criminality. That prediction, however, has only the remotest possibility of being accurate. By allowing such predictions to form the basis for a massive curtailment of personal liberty, it is extremely likely that the fundamental right to liberty is thereby being erroneously deprived. Under the test set forth in Mathews v. Eldrige, 424 U.S. 319, 335 (1976), the risk of erroneous deprivation of the fundamental

right to liberty which the practice of preventive detention imposes far outweighs the state's interest in protecting society and the accused child. Furthermore, while these state interests are indeed legitimate they cannot be constitutionally promoted through a procedure which punitively incarcerates a juvenile prior to an adjudication of guilt based upon crimes which have not even been committed.

II. Preventive Detention Does Not Promote Any of the Unique and Beneficial Goals of the Juvenile Justice System.

Appellants and Amici for the Appellants have intimated that preventive detention is a critical component of the juvenile justice system's rehabilitative procedures and that if the practice remains outlawed, the continued existence of the juvenile justice system will be jeopardized. Amicus for Appellees suggests that just the opposite is true. Removing a child from his family and the community and incarcerating him in a secure detention facility can in no way be considered rehabilitative or beneficial to the child.

Additionally, when such punishment is imposed for transgressions of the law which the child has not committed, the juvenile can hardly be expected to develop a healthy respect for our system of laws nor to develop a system of internal controls necessary to becoming a law abiding citizen.

Amicus for the Appellees agrees with the Appellants and their Amici that due process within the juvenile court system is to be measured by the "fundamental fairness" standard articulated by this Court in In re Gault, 387 U.S. 1 (1967), In re Winship, 397 U.S. 358 (1970), and McKeiver v. Pennsylvania, 403 U.S. 528 (1971). Amicus for the Appellees is

somewhat at a loss, however, in understanding how a statute which imposes punishment prior to an adjudication of guilt, based upon crimes which the detainee has not committed, can possibly be considered fundamentally fair.

Appellants and Amici for the Appellants furthermore assert that what is fundamentally fair for due process purposes are those procedures which do not infringe upon the juvenile court's unique, informal and beneficial aspects. Their claim is that a procedure which provides for the secure confinement of juveniles awaiting trial promotes the flexibility, informality and rehabilitative care and treatment aspects of the

juvenile justice system, and that locking up the child is truly necessary to promote the child's own best interests. We would do well at this point to remember the state of affairs within the juvenile justice system which prompted this Court's decisions in cases such as McKeiver v. Pennsylvania.

> In theory the Court's operations could justifiably be informal, its findings and decisions made without observing ordinary procedural safeguards, because it would act only in the best interest of the child. In fact it frequently does nothing more nor less than deprive a child of liberty without due process of law-knowing not what else to do and needing, whether admittedly or not, to act in the community's interest even more imperatively than the child's. In theory it was to exercise its protective powers to bring an errant child back into the fold. In fact there

> is increasing reason to believe that its intervention reinforces the juvenile's unlawful impulses. In theory it was to concentrate on each case the best of current social science learning. In fact it has often become a vested interest in its turn, loathe to cooperate with innovative programs or avail itself of forward-looking methods.

403 U.S. at 544, n.5 (emphasis added). Amicus for the Appellees respectfully suggests that only the Appellants' "best interests" are being promoted by the challenged statute.

Amicus for the Appellants, a coalition of state attorneys general, insist however that preventive detention is fundamentally fair and in the Appellees' best interest for a number of reasons. They assert

that once a child is accused of a delinquent act, pretrial detention prevents the juvenile from embarking on a "downward spiraling pattern" of delinquent behavior; it operates to "spare the child additional rehabilitation or punishment, and aid the child in maturing into a law abiding citizen." Brief of Amicus Zimmerman, et al., for the Appellants at 21. In addition to noting with interest the reference to "further punishment" being avoided through the use of preventive detention, punishment which Appellants argue does not exist within the statutory scheme, Amicus for the Appellees questions how the asserted goal of preventing

further contacts with the juvenile court system is accomplished by confining the Appellee within that system's secure detention facilities rather than placing the Appellee within the community where he could be provided with counselling, supervision or other forms of pretrial services. In essence, Appellants and Amici for the Appellants claim to be saving the Appellees from the spectre of future punishment which would be imposed through confinement in a state training school by their parens patriae decision to detain the Appellees prior to trial in a local secure detention center. When followed to its somewhat perverse conclusion, this "best

interest of the child" argument would seem to allow for the secure confinement of all children until the age of majority in order that they may be prevented from engaging in delinquent behavior and embarking on the road to personal ruin.

In conclusion, Amicus for the Appellees submits that none of the juvenile court's "unique benefits" will be undermined by a ban on the use of preventive detention. Permitting the pretrial release of juveniles, subject only to adequate assurances that they will appear at their adjudicatory and, if necessary, dispositional hearings, will not diminish the flexibility and informality of the court, nor

will it in any way interfere with concerns for privacy and confidentiality of proceedings. Most importantly, as pointed out above, there is no apparent reason why pretrial release should hamper the court's ability to seek rehabilitation of its youthful offenders. In any event, under no circumstances may the court undertake to rehabilitate any juvenile before it until his guilt or innocence on the underlying charges has been determined.

Amicus for the Appellees urges that the opinions and orders of the courts below be upheld for their refusal to carve out of our system of justice a veritable due process netherworld into which our nation's

youth would be relegated. When stripped of their rhetoric, the arguments presented by the Appellants and Amici for the Appellants call for a return to the era of "child as chattel", when the mere invocation of the phrases "parens patriae" and "best interests of the child" justified the deprivation of a juvenile's rights, including those rights at stake here. This justification for denying Appellees certain constitutional rights was laid to rest by this Court nearly twenty years ago. In re Gault, 387 U.S. at 21. It should not now be resurrected from its questionable past.

Conclusion

For all of the above stated reasons, Amicus for the Appellees respectfully prays that this Court affirm the opinion and order of the Court of Appeals for the Second Circuit.

Respectfully submitted,
on October 13, 1983.

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